IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MELISSA CRAMER,

Plaintiff,

v. **Case No. 04-2102-JWL**

DEVERA MANAGEMENT CORPORATION, et al.,

Defendants.

MEMORANDUM AND ORDER

Plaintiff Melissa Cramer filed this action in state court against defendants Devera Management Corporation, Chaffin of O.P. Inc., Derek, Inc., Evan, Inc., J & S Restaurant, Inc., K & I, Inc., NMM Restaurant, Inc. (collectively, the "corporate defendants"), and Javier M. Vazquez. Plaintiff asserts claims of sexual harassment in violation of the Kansas Act Against Discrimination, K.S.A. § 44-1001 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and state common law tort claims arising from the alleged rape of plaintiff by Mr. Vasquez, who was plaintiff's supervisor at the McDonald's where she worked which is allegedly operated and managed by the corporate defendants. This matter is presently before the court on plaintiff's motion to remand (Doc. 3). For the reasons set forth below, plaintiff's motion is denied.

BACKGROUND

Plaintiff commenced this lawsuit on March 3, 2004, by filing an action in state court in Johnson County, Kansas. On the same day, plaintiff's counsel filed an affidavit for service by publication on Mr. Vasquez based upon a belief that Mr. Vasquez is residing in Mexico. Plaintiff served the corporate defendants on or about March 5. On March 9, plaintiff commenced service by publication on Mr. Vasquez. On March 12, the corporate defendants filed their notice of removal. The service by publication on Mr. Vasquez ran for three consecutive weeks until March 23 as required by K.S.A. § 60-307(d). On March 25 and again on March 29, plaintiff filed a proof of service by publication on Mr. Vasquez in state court. Mr. Vasquez has not filed a notice of consent to the corporate defendants' removal.

On April 9, plaintiff filed a motion to remand this case to state court, alleging the removal was defective because Mr. Vasquez did not join in or consent to the notice of removal. The corporate defendants, however, contend Mr. Vasquez did not need to join in or consent to the notice of removal because he had not yet been served at the time of removal. The corporate defendants contend that service on Mr. Vasquez was not complete pursuant to K.S.A. § 60-307(f) until plaintiff filed the proof of service on March 25.

STANDARD FOR REMOVAL

A civil action is removable only if a plaintiff could have originally brought the action in federal court. 28 U.S.C. § 1441(a). The court is required to remand "if at any time before final judgment it appears that the district court lacks subject matter jurisdiction." *Id.* §

1447(c). Because federal courts are courts of limited jurisdiction, the law imposes a presumption against federal jurisdiction. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). The party invoking the court's removal jurisdiction has the burden to establish the court's jurisdiction. *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995). The court must resolve any doubts in favor of remand. *Fajen v. Found. Reserve Ins. Co.*, 683 F.2d 331, 333 (10th Cir. 1982).

ANALYSIS

Title 28 U.S.C. § 1446(a) requires that "[a] defendant or defendants desiring to remove any civil action . . . shall file . . . a notice of removal." Courts have interpreted this language to establish a unanimity rule whereby all defendants who have been served must join in or consent to the notice of removal. *Cornwall v. Robinson*, 654 F.2d 685, 686 (10th Cir. 1981); *Liebau v. Columbia Cas. Co.*, 176 F. Supp. 2d 1236, 1243 (D. Kan. 2001); *Wakefield v. Olcott*, 983 F. Supp. 1018, 1021 (D. Kan. 1997); *McShares, Inc. v. Barry*, 979 F. Supp. 1338, 1342 (D. Kan. 1997); *Cohen v. Hoard*, 696 F. Supp. 564, 565 (D. Kan. 1988). It is well settled, though, that a defendant who has not been served need not join in or consent to removal. *See Gillis v. La.*, 294 F.3d 755, 759 (5th Cir. 2002) (observing that "all *served* defendants must join in the removal petition" (emphasis added)); *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 n.3 (6th Cir. 1999) (observing that "all defendants *who have been served* . . . must either join in the removal, or file a written consent to the removal" (emphasis added)); *Liebau*, 176 F. Supp. 2d at 1243 (recognizing the exception for defendants

who have not yet been served); *McShares, Inc.*, 979 F. Supp. at 1342 (same); *Cohen*, 696 F. Supp. at 565 (same). This exception for unserved defendants rests on the "bedrock principle" that "[a]n individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process." *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347 (1999).

The Kansas statute pursuant to which service was made on Mr. Vasquez in this case requires the notice to "be published once a week for three consecutive weeks." K.S.A. § 60-307(d). It further provides that "[s]ervice by publication shall be deemed complete when it has been made in the manner *and for the time prescribed* in subsections (d) and (e)." *Id.* § 60-307(f). Thus, service on Mr. Vasquez was not complete at least[1] until the notice had been published for three consecutive weeks on March 23. This was after the corporate defendants filed their notice of removal on March 12, and therefore Mr. Vasquez did not need to join in or consent to the corporate defendants' notice of removal because he was not served until after the notice of removal was filed. *See, e.g.*, *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 369 (7th Cir. 1993) (consent was not required from defendant who was not served until after the notice of removal was filed); *Reeser v. NGK Metals Corp.*, 247 F. Supp. 2d 626, 631 (E.D. Pa. 2003) (same); *Hooper v. Albany Int'l Corp.*, 149 F. Supp. 2d 1315, 1319 n.2 (M.D. Ala. 2001) (same); *Dunson-Taylor v. Metropolitan Life Ins. Co.*, 164 F. Supp. 2d 988, 991-92 (S.D. Ohio 2001) (same).

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[1] The corporate defendants' related argument that service on Mr. Vasquez was not complete until plaintiff filed the proof of service on March 25 is moot.

This conclusion is consistent with the only other decision by a judge of this court to have considered a related issue under the Kansas service-by-publication statute. In *Godley v. Valley View State Bank*, No. 99-2531, 2000 WL 1114927, at *1-*3 (D. Kan. July 6, 2000), Judge VanBebber initially denied the plaintiffs' motion to remand. In doing so, the court noted that the state court record included a notice of suit for service by publication for one of the defendants, Babarskas, who had not consented to the notice of removal, but the record did not contain evidence that Babarskas had been properly served. *Id.* at *1 n.1. The court observed that if Babarskas had been properly served, "the court would likely have remanded the case because the unanimity rule would not have been met." *Id.* On reconsideration, the court remanded the case to state court. *Godley v. Valley View State Bank*, No. 99-2531, 2000 WL 1863375, at *1-*3 (D. Kan. Dec. 15, 2000). The court found that "service by publication upon defendant Babarskas was complete at the time" the case was removed, and therefore his consent was required for removal under the unanimity rule. *Id.* at *1. The first publication was on October 26, 1999, and the last publication was on November 9, 1999, "which was before removal on November 24, 1999." *Id.* at *1-*2.

In contrast, here, as explained previously, the last notice was published *after* removal. Therefore, service on Mr. Vasquez was not complete at the time of removal. Accordingly, his consent to the corporate defendants' notice of removal was not required.

IT IS THEREFORE ORDERED BY THE COURT that plaintiff's motion to remand (Doc. 3) is denied.

IT IS SO ORDERED this 27th day of May, 2004.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge